

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1484

Docket No. 77-1484

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America,

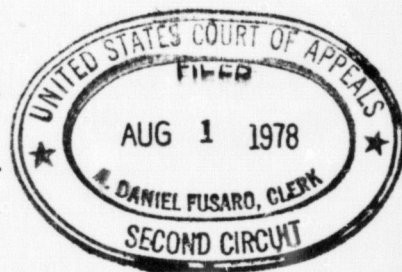
Plaintiff-Appellee,

v.

Arnold Nelson Mahler,
Dean H. Ubben,

Defendants-Appellants.

Pro-Se Petition for Rehearing with
Suggestion for Rehearing En Banc



Arnold Nelson Mahler
Pembroke Station
Danbury, Ct. 06810

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUG 1 1978

UNITED STATES OF AMERICA
Plaintiff,
Appellee,

vs.

ARNOLD NELSON MAHLER &
DEAN H. UBSEN,
Defendant,
Appellant.

Docket Nos. 77-1481,
78-1048

In Re: Petition for Rehearing En Banc

MOTION

Now comes Arnold Nelson Mahler, Defendant-Appellant, to Petition this Court to accept the Argument in Support of Rehearing En Banc set forth herein.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING EN BANC

In the affirming opinion of June 26, 1978 delivered by Judge Oakes in the Appellant's case, the learned Judge stated:

'Mahler's most substantial point relates to the introduction into evidence by the Government of Mahler's prior convictions pursuant to Rule 609 (b) of the Federal Rules of Evidence. This evidence had previously been admitted in the Government's direct case under Rule 404 (b), for the limited purpose of proving knowledge and intent. See note 20 infra. [But] It was readmitted after Mahler took the stand, to impeach his credibility.' Emphasis here added.

Rule 404 (b) expressly says:

'Evidence of other crimes, wrongs, or acts is not admissible to prove the character [or credibility] of a person in order to show that he acted in conformity therewith [or to impeach his credibility].'
See Rule 404 (b), Fed. Rules Ev. See also Black's Law Dictionary, Revised Fourth Edition, Copyright 1968, pages 294, 440, 886.

The Fifth Amendment provides:

'No person shall be compelled in any criminal case to be a witness against himself, nor [shall he] be deprived of life, liberty, or property, without due process of law....'

The Sixth Amendment provides:

'The accused [he] shall enjoy the right
to a trial by an impartial Jury....'

In the Appellant's case, the Constitution lies in the first sentence of Rule 404 (b), and Rule 608 (b) expressly says that the giving of testimony, whether by an accused or by any other witness [person], does not operate as a waiver of his privilege against self incrimination when examined with respect to matters which relate only to credibility. Since the Constitution of the Appellant's case has now been brought to light, let us recognize the fact that criminal statutory provisions and rules must be given strict construction in favor of the person [Appellant-Mahler] where substantial rights are involved. Let us also note that in the case at bar, arguments concerning the dictum of prejudice in reference to the Appellant's case can now be put aside, because at the point the Government reintroduced the evidence to impeach the Appellant's [his] credibility, due process was destroyed, jurisdiction was lost, a constitution-

al error occurred, plain error took place, the ban on self incrimination was abrogated, and the Sixth Amendment was destroyed or substantial rights were denied. In fact, the Appellant's case should not have been given to the Jury, because under Rule 404, inquiry regarding defendant's character weighs too much with the Jury and causes them to prejudge one with a bad general record, thus denying him a fair opportunity to defend against particular charge. See Michelson v. United States, 69 S.Ct. 213, 335 U.S. 469.

Rule 404 (b) expressly says in Law and in Fact:

'No evidence of a defendant's [person's] other crimes, wrongs, or acts or (to wit) incriminating evidence, shall be admitted to a Jury to prove the character or credibility of the defendant [person] in order to show that he [person] acted in conformity therewith or to impeach his [person's] credibility.'

The procedure in 609 (b) designed to give defendant's fairness was completely abrogated in the Appellant's case, and this fact is noted by the Honorable Judge Oakes in his opinion. If this procedure would have been followed, there would have been no [person's] need to bring the Constitution. The Appellant recognizes the fact that this Circuit

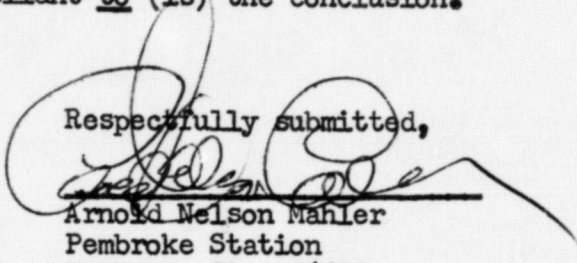
Court should avoid meeting the Constitutional issue or McBoyle v. United States if the issue can be decided in another way, and the Appellant puts it to this Circuit Court that the entire proceedings in his case did not meet the standard of fundamental fairness.

Gentlemen, the Appellant's case has now become a matter of law or a matter of jurisdiction, because the Government has no right to violate the Laws of Congress. See United States v. Salen, 235 U.S. 237, 35 S.Ct. 51; Fasulo v. United States, 272 U.S. 620, 47 S.Ct. 200; Prussian v. United States, 282 U.S. 675, 51 S.Ct. 223; McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340. It should be noted that the supreme Court equates Constitutional errors to lack of jurisdiction. In other words, Constitutional errors or (is) lack of jurisdiction. See Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442; Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298. It is also a well recognized fact that jurisdiction can be raised at any time or ~~the~~ for the first time on appeal.

Wherefore: The Appellant prays that the Petition for Rehearing En Banc be granted and that the Appellant's conviction be reversed.

Now comes the Appellant to (is) the conclusion.

Respectfully submitted,



Arnold Nelson Mahler
Pembroke Station
Danbury, Ct. 06810

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Plaintiff,
Appellee,

vs.

ARNOLD NELSON MAHLER &
DEAN H. UBBEN,
Defendants,
Appellants.

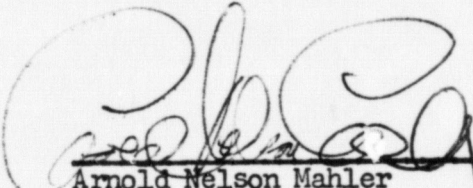
Docket Nos. 77-1484
78-1048

In Re: Petition for Rehearing
En Banc.

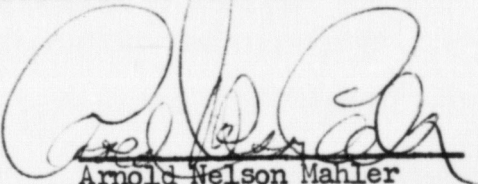
CERTIFICATE OF SERVICE

I, Arnold Nelson Mahler, Defendant-Appellant, depose and say that I have served the original and three copies of the attached Motion and Argument on the Office of the Clerk, United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York 10007; that I have served a copy on the Office of the United States Attorney, Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007, by mail from the Federal Correctional Institution, Danbury, Ct. 06810, on this 27th day of July, 1978.

State of Connecticut
County of Fairfield


Arnold Nelson Mahler

I, Arnold Nelson Mahler, under the penalty of perjury, state that the information in the above affidavit is true and correct. See P.L. 94-500; 28 U.S.C. 1746.


Arnold Nelson Mahler